BEFORE THE TENNESSEE DEPARTMENT OF EDUCATION
DIVISION OF SPECIAL EDUCATION

IN THE MATTER OF: **J. C.**, **Petitioner,** **v.** **UNION CITY SCHOOLS,** **Respondent.**	**DOCKET NO: 07.03-101540J**

FINAL ORDER

This matter was heard on May 27-28, 2009, before Bettye Springfield, Administrative Judge, assigned by the Secretary of State, Administrative Procedures Division. John Kitch, with the Davidson County bar, represented the Respondent, Union City School System. The Petitioners, J.C. and his parents, were represented by Marcella Derryberry, with the Davidson County bar.

At the conclusion of the hearing, the matter was taken under advisement, pending the parties filing Proposed Findings of Fact and Conclusions of Law. Those documents were filed by July 2, 2009.

The subject of this proceeding is whether the Respondent has provided Petitioner J. C. a free appropriate public education (FAPE). After consideration of the entire record, testimony of witnesses, and argument of the parties, it is DETERMINED that the Respondent is in compliance with the Individuals with Disabilities Act (IDEA) procedures and is providing J.C. FAPE.

This determination is based on the following findings of fact and conclusions of law:

PROCEDURAL BACKGROUND AND STATEMENT OF ISSUES

On January 15, 2009, the Petitioners/parents filed a Due Process Complaint with the Respondent, on behalf of their son, J. C. The Petitioners alleged that the Respondent/School District failed to timely refer and identify J. C.'s special education needs and failed to provide him with an appropriate individualized program with behavioral supports, which resulted in a denial of a free appropriate public education (FAPE). A Resolution Session was held on February 11, 2009, where the parties agreed to develop an IEP, and the School District was to conduct a functional behavior assessment and include reading objectives for J. C. All pertinent issues were essentially resolved at this meeting. The parents then requested payment for attorney fees and the fee for clinical psychologist Dr. Gary Brown. The School District denied the request for such payments and the parents rejected the tentative resolution.

The Parents have presented issues for review as follows: 1) Failure to refer, evaluate and identify a child with a disability and provide an appropriate Individualized Education Program, "IEP" resulting in a denial of a Free and Appropriate Public Education "FAPE;" 2) Failure to develop and implement an appropriate IEP with appropriate behavioral support and fluency reading objectives resulting in a denial of FAPE; 3) Failure to conduct a functional behavioral assessment and develop a behavior intervention plan resulting in a denial of FAPE; 4) The failure to refer, identify, evaluate and develop an IEP as listed above is a procedural violation of the Individuals with Disabilities Education Act ("IDEA"), 20 U.S.C. § 1400 *et seq.* resulting in a denial of FAPE; and 5) Failure to allow the Parents meaningful participation in the IDEA process at the Resolution Meeting is a procedural violation as well and resulted in a denial of FAPE.

However, the School District and the parents have agreed to an updated individualized education plan and J. C. has now entered special education. All issues raised by the parents, except for those relating to Dr. Brown's therapy are moot. "[A] case becomes moot when '*by an act of the parties*, or a subsequent law, *the existing controversy has come to an end* . . . .'" *Caldwell v. Craighead*, 432 F.2d 213, 218 (6th Cir. 1970)(emphasis added), citing *United States v. Alaska Steamship Company*, 253 U.S. 113, 116, 40 S.Ct. 448, 449, 64 L.Ed. 808 (1920). Therefore, the sole issue remaining or review is whether the School District should pay the fee for Dr. Brown's therapy.

It is noted that the Petitioners contend that at the Resolution Session the parties developed a potential IEP and that this Judge ordered the parties to implement the IEP. First, as the School District correctly points out, the Resolution Session is not an IEP meeting. Rather, this is a mandatory preliminary meeting, before a contested hearing of the matter, pursuant to 20 U.S.C. § 1415(f)(1)(B).

Second, the Petitioners reference the March 6, 2009 Order that reads, "[t]he parties agree to informally work together to schedule a meeting in order to implement an interim IEP," but, nevertheless, cite to the transcript to argue that the IEP was ordered.[1] Not only does this directly contradict the March 6th Order and the preceding statement, it is **incorrect**. The court reporter clearly misunderstood what this Judge said. That statement should read: "**I do not recall a direct order**." Furthermore, the Order correctly states the true finding by the court.

[1] Transcribed at pages 339-340 of the transcript, and attributed to the Court is the following: "It's not that you agree to work together to come to some resolution. I did recall a direct order to get it done."

FINDINGS OF FACTS

1. J. C. had just completed his third grade at Union City Elementary School at the time of this hearing. He was diagnosed with Asperger's Syndrome, an autistic spectrum disorder, on January 23, 2008.

2. J. C. has attended Union City Elementary since kindergarten, which was the 2005-2006 school year. During this academic year, the kindergarten teacher saw him as an average kindergartner. His reading skills were average for a kindergartner, although he had trouble in some areas. She described him as quirky and noted that at recess he paced around the fence alone and rarely interacted with other children, but she never thought J. C. needed to be referred to special education. She saw him as making reasonable educational progress during his year in kindergarten.

3. The father noticed that J. C. might have some issues as early as preschool, and the father's fiancée, a formerly certified special education teacher, suspected issues about the same time. The aunt, who was a licensed clinical psychologist, had observed J C. over the years and noticed an unusual cadence and pitch to his voice as a toddler. He was also delayed in responding to others, if he responded at all. However, there was no request that J. C. be tested at that time. The father's fiancée stated the School District was a "fantastic" school system that had done a lot for J. C.

4. There is no information in the record about the J.C.'s first grade year, 2006-2007, as that teacher is no longer with the School District and she was not called to testify.

5. Laura Oliver, J. C.'s second grade teacher in academic year 2007-2008, saw him as very bright, quiet, and well-behaved. He was a good listener, but had some difficulty focusing and starting a task. Although he got off task at times, he could be directed to get back on-task. J. C.

also had some difficulty reading with understanding what he had read, but his teachers considered him academically bright. Students with Asperger's Syndrome are high functioning and verbal with good vocabularies, and hard to identify as having a disability.

6. After nine weeks into his second grade academic year, Ms Oliver felt that J. C. might need to be referred for an evaluation, and spoke to his father about making the referral. The father agreed to an evaluation, but wanted his sister-in-law, a licensed clinical psychologist, to do the testing. Ms. Oliver would have suggested that the School District provide testing if the father had not requested his sister-in-law do the evaluation.

7. Dr. C. completed the evaluation of J. C. in January 2008, during his second grade year. The Psychological stated that J.C. had a Pervasive Developmental Disorder, more specifically Asperger's Disorder.

8. The School District adopted the evaluation and called a meeting on March 5, 2008, to determine eligibility for special education and related services. It was agreed at that meeting that J. C. had a disability, but was not eligible for special education. The father, who did not want J. C. in special education, agreed with this determination, as did J. C.'s mother, the father's fiancée, Dr. Michelle Arant, and J. C.'s second grade teacher.

9. Dr. Arant, Special Education Director for the School District, was qualified as an expert in elementary education, special education, administration and autism. She testified that this determination was appropriate since J. C. had always been educated in the general education classroom and could readily access the general educational curriculum.

10. At the March 5, 2008 meeting, a §504 plan was developed to provide accommodations for J. C. The plan indicated J. C. would have peer tutoring, oral testing, abbreviated assignments, no timed testing, and material read aloud for testing purposes.

11. Laura Oliver testified that this plan was a benefit to J. C. educationally, that he made "tremendous gains" by the end of his second grade year, and that he was ready for third grade even when reading on his own. J. C. did not have tantrums and was not disruptive in class. J. C.'s father felt that J. C. had done well in the second grade except for the fact that his homework was taking a long time

12. Ms. Oliver considered Trudy Evans the best third grade teacher for J. C. because of her years of teaching and her structure in the classroom. She helped select Ms. Evans as J. C.'s teacher. Before the third grade year began, Ms. Oliver met with Ms. Evans and discussed J. C.'s situation. Ms. Evans was receptive to advice regarding J. C.

13. At the start of the third grade, J.C. had not been identified under IDEA as a student in need of special education.

14. In September of 2008, the parents hired Dr. Gary Brown, a clinical psychologist, to help J. C. The child was having problems, which included depression and low self-esteem. Dr. Brown was hired to provide psychological help for these problems J. C. was having in the home. The mother testified as to his problems at the start of the third grade, and the impact that Dr. Brown's assistance made in dealing with J.C.

15. The parents take J.C. weekly for one hour visits with Dr. Brown who, through ABA therapy, addresses J.C.'s behaviors. At Dr. Brown's recommendation, they enrolled J.C. in the reading program at the Sylvan Learning Center, in Jackson, Tennessee, where he receives four hours a week in direct reading instruction.

16. The parents did not contact the School District about the hiring of Dr. Brown before retaining his services.

17. The parents later requested a meeting with the school regarding their concerns for J. C., which included that he be at grade level with reading and handwriting, and that his social skills improve.

18. The meeting was held October 22, 2008. It began as a § 504 meeting but was transformed into an individualized education plan (IEP) meeting. The School District obtained the proper people for an IEP meeting and a proposed IEP was developed after the team determined that J. C. was eligible for special education and related services.

19. This IEP included behavior goals and reading goals and provided for a guidance counselor and social worker to work with J. C. on socialization issues. The parents refused to sign the IEP or give permission for J. C.'s initial entry into special education.

20. The mother refused to sign the IEP because the qualification of the implementing personnel was not provided. The father also wanted to know the qualifications. Dr. Arant sent the parents a letter advising that the School District personnel who would be working with J. C. met the licensing standards and were highly qualified to provide the needed services.

21. Dr. Brown testified as an expert in research and the treatment of autism. He was hired by the parents to address J. C.'s behaviors in the home, including tantrums and self-esteem issues. The parents were also concerned about his depression, but Dr. Brown had not gotten to the emotional problems with J. C. because they are lower on his priority list. Dr. Brown considers the work he does with the patient to be therapy.

22. Dr. Brown has not observed J. C. in his school setting and has not spoken about the child with any School District personnel. Dr. Brown admitted that he was not familiar with the School District's programs for J. C., has not seen the §504 plan, and he has not attended any §504 or IEP meetings. The only information he has about J. C.'s situation at school consists of

reports from the parents, test results, and homework. He also has not provided any information to the School District about his therapy with J. C.

23. Dr. Brown could not render an opinion about the appropriateness of the educational program for J. C., as far as what happens in the classroom. He also was not familiar with what the School District was doing for J. C, including how he has progressed, how the school personnel are working with him, or what his behaviors are at school.

24. On November 3, 2008, the parents filed an Administrative Complaint with the Tennessee Department of Education. The Complaint stated a lack of child find, failure to tell parents of a contact person, not offering services to help with the Student until they already had contracted with an outside person, and not providing detailed information about School District service providers.

25. On December 10, 2008, Assistant Commissioner Joseph Fisher responded to the Administrative Complaint, finding that the School District had complied with the law in all respects.

26. On January 15, 2009, the parents filed a Due Process Complaint, on the same basic issues raised in the Administrative Complaint.

27. A Resolution Session was held on February 11, 2009. The parties agreed on the substantive issues. The School District declined the parents' request to pay Dr. Brown or the parents' attorney's fees, and no resolution agreement was signed.

CONCLUSIONS OF LAW

1. The Petitioners in this case have the burden to introduce evidence that would by a preponderance of the evidence prove the issues should be resolved in Petitioners' favor. Rule 1360-4-1-.02, Uniform Rules of Procedure for Hearing Contested Cases before State Administrative agencies.

2. The IDEA provides that children with disabilities be provided FAPE. Board of Education of the Hendrick Hudson Central School District, Westchester County v. Rowley, 458 U.S. 176 (1982). As part of providing FAPE, school districts are required to establish an individual education plan for each child with a disability. Id.

3. In determining whether a free appropriate public education has been provided to a certifiably disabled student, the inquiry of the courts under the IDEA is two-fold: 1) has the State complied with the procedures set forth in the Act? and 2) is the IEP developed through the Act's procedures reasonably calculated to enable the child to receive educational benefits. Once the school district has met these two requirements, the courts cannot require more.

4. It is provided in C.F.R. § 300.17, regarding free appropriate public education of the IDEA, as follows:

> Free appropriate public education or FAPE means special education and related services that-
>
> > (a) Are provided at public expense, under public supervision and direction, and without charge;
> > (b) Meet the standards of the SEA, including the requirements of this part.
> > (c) Include an appropriate preschool, elementary school, or secondary school education in the State involved; and
> > (d) Are provided in conformity with an individualized education program (EP) that meets the requirements of §300.320 through 300.324.

5. The Petitioners contend that the School District failed to refer, evaluate and identify J. C. as a child with a disability, and failed to develop and implement an appropriate IEP for him resulting in the denial of FAPE, therefore, they posits Dr. Brown's services were needed to address J. C.'s problems. As a natural extension of this contention, the parents argue for the payment of Dr. Brown's fees.

6. However, this argument must fail for several reasons. First, the IEP developed at the October 22, 2008 meeting was designed to provide educational benefit, and had the parents signed it, the IEP would have provided that benefit. However, since this would have been J. C.'s initial entry into special education, the IEP could not be implemented without the parents' signature. The parents' refused to consent prevented the School District from providing J. C. special education and related services:

7. Pursuant to 20 U.S.C. §1414(a)(1)(D) Parental consent, it is provided:

> (i) In general
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> * * *
>
> (II) Consent for services
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> An agency that is responsible for making a free appropriate public education available to a child with a disability under this subchapter shall seek to obtain informed consent from the parent of such child before providing special education and related services to the child.
>
> (ii) Absence of consent
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> * * *
>
> (II) For services
>
> If the parent of such child refuses to consent to services under clause (i)(II), the local educational agency shall not provide special education and related services to the child by utilizing the procedures described in section 1415 of this title.
>
> (III) Effect on agency obligations
>
> If the parent of such child refuses to consent to the receipt of special education and related services, or the parent fails to respond to a request to provide such consent—

> (aa) the local educational agency shall not be considered to be in violation of the requirement to make available a free appropriate public education to the child for the failure to provide such child with the special education and related services for which the local educational agency requests such consent; and
> (bb) the local educational agency shall not be required to convene an IEP meeting or develop an IEP under this section for the child for the special education and related services for which the local educational agency requests such consent. (Emphasis added.)

8. Further, Dr. Brown was hired by the parents to address behavioral issues that J. C. was having in the home, and the proof did not show J. C. exhibited the same behaviors in the school setting. The School District was not asked to provide the same services as Dr. Brown and could have provided them itself. Moreover, the School District had no information about what therapy Dr. Brown was doing with J. C. because Dr. Brown never communicated with the School District about these services, and admitted that he could render no opinion about appropriateness of the educational program as far as what happens in the classroom.

9. A school system is only required to pay for outside services if there was a need for such services, if the school district failed to provide appropriate services and if the service is a related service reasonably calculated to enable the child to receive educational benefits. *See Knable ex rel. Knable v. Bexley City Sch. Dist.,* 238 F.3d 755, 763 (6th Cir.2001).

10. Dr. Brown's therapies do not qualify as a related service under the IDEA. Related services are "supportive services . . . as may be required to assist a child with a disability to benefit from special education." 20 U.S.C.A. § 1401(a)(17). Mandating school district payment of services merely "supportive of a handicapped child's education" is inappropriate as "far too inclusive." *Clovis Unified School Dist. v. California Office of Administrative Hearings,* 903 F.2d

635 (9th Cir.1990) (noting that some services, though both important to the child and ultimately beneficial to an education, are not the responsibility of the school district).

11. The Sixth Circuit has made the test clear: "To assess whether a [private service] is appropriate, a determination must be made whether it is necessary for educational purposes as opposed to medical, social, or emotional problems that are separable from the learning process." *Tennessee Dept. of Mental Health and Mental Retardation v. Paul B.*, 88 F.3d 1466, 1471 (6th Cir. 1996)(Emphasis added.)

12. In this case, Dr. Brown's therapy is not a related service because it was to address behaviors at home that were not being seen at school, and was not designed to access the educational program. Addressing behavioral issues at home that do not manifest themselves in the educational environment at school is a parent's right, but that does not mean that a school system should be required to pay for addressing those home issues. *Katherine S. v. Umbach*, 2002 WL 226697, *10 (M.D. Ala.) held:

> The behavior problems and family conflict experienced at home were not reflected in her behavior at school . . . Thus, there is no evidence to suggest that she required specially designed instruction in order to access and benefit from the general curriculum at [school].

13. It is CONCLUDED that the services of Dr. Brown are unrelated to the educational program and therefore his services are not related services within the meaning of the Individuals with Disabilities Education Act (IDEA), 20 U.S.C. § 1400 *et seq*.

14. Finally, it is noted that Dr. Brown's services, retained in September of 2008, were engaged before a complaint was made to the School District about J. C.'s behavioral issues, on October 22, 2008. The School District was entitled to be advised of any alleged dissatisfaction and to have an opportunity to correct whatever flaws that may have existed. *See Berger v.*

Medina City School District, 348 F.3d at 513, 523 (6th Cir. 2003). In fact, the parents refused placement in special education, at the time of these services, when the educational need could have been addressed.

15. It is specifically CONCLUDED that the Petitioners have failed to show a denial of FAPE regarding any of the issues presented herein.

16. Based on the foregoing, it is CONCLUDED that the School District, is not liable for payment for Dr. Brown's services, under the IDEA.

17. It is DETERMINED that Respondent is in compliance with IDEA procedures, has not committed any procedural or substantive violations of IDEA, and Respondent is providing J.C. FAPE. It is ORDERED that the remedies and relief sought by Petitioners are denied. Respondent is the prevailing party in this matter.

This Order is entered and effective this 6th day of August 2009.

/s/ *Bettye Springfield*
BETTYE SPRINGFIELD
ADMINISTRATIVE JUDGE

Filed in the Administrative Procedures Division, Office of the Secretary of State, this 6th day of August 2009.

/s/ *Thomas G. Stovall*
Thomas G. Stovall, Director
Administrative Procedures Division